HIGH COURT OF AUSTRALIA

FRENCH CJ,
CRENNAN, KIEFEL, GAGELER AND KEANE JJ

IAN WALLACE APPELLANT

AND

DR ANDREW KAM RESPONDENT

Wallace v Kam
[2013] HCA 19
8 May 2013
S307/2012

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

P W Bates with P G White for the appellant (instructed by Gerard Malouf & Partners)

D J Higgs SC with E M Peden for the respondent (instructed by TressCox Lawyers)

CATCHWORDS

Wallace v Kam

Negligence – Causation – Medical practitioner – Where medical practitioner failed to warn patient of two distinct material risks inherent in surgical procedure – Where only one risk eventuated – Where patient would have chosen not to undergo surgical procedure if warned of both risks – Where patient would have chosen to undergo surgical procedure if warned only of risk that eventuated – Whether failure to warn of both material risks was a necessary condition of injury caused by the risk that eventuated – Whether appropriate for scope of medical practitioner's liability to extend to that injury.

Words and phrases – "but for", "factual causation", "scope of liability".

Civil Liability Act 2002 (NSW), s 5D.

1 FRENCH CJ, CRENNAN, KIEFEL, GAGELER AND KEANE JJ. Mr Wallace sought medical assistance in relation to a condition of his lumbar spine. Dr Kam, a neurosurgeon, performed a surgical procedure on him. The surgical procedure had inherent risks. One risk was of temporary local damage to nerves within his thighs, described as "bilateral femoral neurapraxia", resulting from lying face down on the operating table for an extended period. Another, distinct risk was a one-in-twenty chance of permanent and catastrophic paralysis resulting from damage to his spinal nerves. The surgical procedure was unsuccessful: the condition of Mr Wallace's lumbar spine did not improve. The first risk materialised: Mr Wallace sustained neurapraxia which left him in severe pain for some time. The second risk did not.

2 Mr Wallace claimed damages from Dr Kam for the neurapraxia he sustained. Mr Wallace's claim in the Supreme Court of New South Wales was that Dr Kam negligently failed to warn him of risks including the risk of neurapraxia and the risk of paralysis and that, had he been warned of either risk, he would have chosen not to undergo the surgical procedure and would therefore not have sustained the neurapraxia.

3 The claim was dismissed at trial. Harrison J found that Dr Kam negligently failed to warn Mr Wallace of the risk of neurapraxia. But he also found that Mr Wallace would have chosen to undergo the surgical procedure even if warned of the risk of neurapraxia. He concluded, for that reason, that Dr Kam's negligent failure to warn Mr Wallace of the risk of neurapraxia was not a necessary condition of the occurrence of the neurapraxia. He declined to make any finding about whether Dr Kam negligently failed to warn Mr Wallace of the risk of paralysis, and about what Mr Wallace would have done if warned of the risk of paralysis, on the basis that the "legal cause" of the neurapraxia "could never be the failure to warn of some other risk that did not materialise"[1].

4 Mr Wallace appealed to the Court of Appeal of the Supreme Court of New South Wales (Allsop P, Beazley and Basten JJA). He argued that Harrison J erred in holding that the legal cause of the neurapraxia could not be the failure to warn of the risk of paralysis. The Court of Appeal tested that argument by assuming that Dr Kam negligently failed to warn Mr Wallace of the risk of paralysis and that, if warned of that risk, Mr Wallace would not have undergone the surgical procedure. Was Dr Kam, on that assumption, liable for the neurapraxia?

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1 *Wallace v Ramsay Health Care Ltd* [2010] NSWSC 518 at [96].

5 The Court of Appeal divided in answering that question. The majority, Allsop P and Basten JA, answered it in the negative. The appeal was therefore dismissed. Beazley JA answered it in the affirmative and would have ordered a new trial.

6 The negative answer of the majority of the Court of Appeal is to be preferred. Mr Wallace's appeal to this Court, which raises the same question, should therefore be dismissed.

Framework for analysis

7 Mr Wallace's claim against Dr Kam was in negligence at common law. The familiar elements of his cause of action were duty, breach and causation of damage. The question raised by the appeal requires attention to the first and third of those elements.

8 The common law duty of a medical practitioner to a patient is a single comprehensive duty to exercise reasonable care and skill in the provision of professional advice and treatment[2]. A component of that single comprehensive duty is ordinarily to warn the patient of "material risks" of physical injury inherent in a proposed treatment[3]. A risk of physical injury inherent in a proposed treatment is material if it is a risk to which a reasonable person in the position of the patient would be likely to attach significance, or if it is a risk to which the medical practitioner knows or ought reasonably to know the particular patient would be likely to attach significance in choosing whether or not to undergo a proposed treatment[4]. The component of the duty of a medical practitioner that ordinarily requires the medical practitioner to inform the patient of material risks of physical injury inherent in a proposed treatment is founded on the underlying common law right of the patient to choose whether or not to undergo a proposed treatment. In imposing that component of the duty, the common law recognises not only the right of the patient to choose but the need for the patient to be adequately informed in order to be able to make that choice rationally. The policy underlying the imposition of that component of the duty is to equip the patient with information relevant to the choice that is the patient's to

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2 *Rogers v Whitaker* (1992) 175 CLR 479 at 489; [1992] HCA 58.

3 *Rogers v Whitaker* (1992) 175 CLR 479 at 490; *Rosenberg v Percival* (2001) 205 CLR 434 at 453 [61]; [2001] HCA 18.

4 *Rogers v Whitaker* (1992) 175 CLR 479 at 490.

make[5]. The duty to inform the patient of inherent material risks is imposed to enable the patient to choose whether or not to run those inherent risks and thereby "to avoid the occurrence of the particular physical injury the risk of which [the] patient is not prepared to accept"[6].

9 The common law duty of a medical practitioner is therefore ordinarily breached where the medical practitioner fails to exercise reasonable care and skill to warn a patient of any material risk of physical injury inherent in a proposed treatment. However, consistent with the underlying purpose of the imposition of the duty to warn, the damage suffered by the patient that the common law makes compensable is not impairment of the patient's right to choose. Nor is the compensable damage exposure of the patient to an undisclosed risk. The compensable damage is, rather, limited to the occurrence and consequences of physical injury sustained by the patient as a result of the medical treatment that is carried out following the making by the patient of a choice to undergo the treatment[7].

10 For particular physical injury sustained by a patient as a result of medical treatment the patient has chosen to have carried out to be compensable, it must be determined to have been caused by the particular failure of the medical practitioner to exercise reasonable care and skill to warn the patient of one or more material risks inherent in that treatment.

11 The common law of negligence requires determination of causation for the purpose of attributing legal responsibility. Such a determination inevitably involves two questions: a question of historical fact as to how particular harm occurred; and a normative question as to whether legal responsibility for that particular harm occurring in that way should be attributed to a particular person. The distinct nature of those two questions has tended, by and large, to be overlooked in the articulation of the common law. In particular, the application of the first question, and the existence of the second, have been obscured by traditional expressions of causation for the purposes of the common law of

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5 *Rogers v Whitaker* (1992) 175 CLR 479 at 486, 488-490.

6 *Chester v Afshar* [2005] 1 AC 134 at 144 [18].

7 Jones, "A Risky Business", (2005) 13 *Tort Law Review* 40 at 49-50; *Clerk & Lindsell on Torts*, 20th ed (2010) at [2-17]; Jones, *Medical Negligence*, 4th ed (2008) at [7-072].

negligence in the conclusory language of "directness", "reality", "effectiveness" and "proximity"[8].

12 Statute now requires that the two questions be kept distinct. Section 5D of the *Civil Liability Act* 2002 (NSW), which is substantially replicated in each other Australian State and the Australian Capital Territory[9], provides:

> "(1) A determination that negligence caused particular harm comprises the following elements:
>
> (a) that the negligence was a necessary condition of the occurrence of the harm (***factual causation***), and
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> (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (***scope of liability***).
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> (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
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> (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:
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> (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

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8 *Miller v Miller* (2011) 242 CLR 446 at 469 [60]; [2011] HCA 9; *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 509-516, 530-533; [1991] HCA 12. See Commonwealth of Australia, *Review of the Law of Negligence: Final Report*, (2002) at 108 [7.25], 116-117 [7.48]-[7.49], 119 [7.50].

9 Section 51 of the *Wrongs Act* 1958 (Vic); s 34(1) and (3) of the *Civil Liability Act* 1936 (SA); s 11 of the *Civil Liability Act* 2003 (Q); s 5C of the *Civil Liability Act* 2002 (WA); s 13 of the *Civil Liability Act* 2002 (Tas); s 45(1) and (3) of the *Civil Law (Wrongs) Act* 2002 (ACT).

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party."

13 Section 5E of the *Civil Liability Act*, which is also substantially replicated in each other Australian State and the Australian Capital Territory[10], provides that in determining liability for negligence, "the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation".

14 The distinction now drawn by s 5D(1) between factual causation and scope of liability should not be obscured by judicial glosses. A determination in accordance with s 5D(1)(a) that negligence was a necessary condition of the occurrence of harm is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E. A determination in accordance with s 5D(1)(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused is entirely normative, turning in accordance with s 5D(4) on consideration by a court of (amongst other relevant things) whether or not, and if so why, responsibility for the harm should be imposed on the negligent party.

15 Thus, as Allsop P explained in the present case[11]:

"[T]he task involved in s 5D(1)(a) is the elucidation of the factual connection between the negligence (the relevant breach of the relevant duty) and the occurrence of the particular harm. That task should not incorporate policy or value judgments, whether referred to as 'proximate cause' or whether dictated by a rule that the factual enquiry should be

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10 Section 52 of the *Wrongs Act* 1958 (Vic); s 35 of the *Civil Liability Act* 1936 (SA); s 12 of the *Civil Liability Act* 2003 (Q); s 5D of the *Civil Liability Act* 2002 (WA); s 14 of the *Civil Liability Act* 2002 (Tas); s 46 of the *Civil Law (Wrongs) Act* 2002 (ACT).

11 *Wallace v Kam* (2012) Aust Torts Reports ¶82-101 at 66,044-66,045 [4].

limited by the relationship between the scope of the risk and what occurred. Such considerations naturally fall within the scope of liability analysis in s 5D(1)(b), if s 5D(1)(a) is satisfied, or in s 5D(2), if it is not."

16 The determination of factual causation in accordance with s 5D(1)(a) involves nothing more or less than the application of a "but for" test of causation[12]. That is to say, a determination in accordance with s 5D(1)(a) that negligence was a necessary condition of the occurrence of harm is nothing more or less than a determination on the balance of probabilities that the harm that in fact occurred would not have occurred absent the negligence.

17 In a case where a medical practitioner fails to exercise reasonable care and skill to warn a patient of one or more material risks inherent in a proposed treatment, factual causation is established if the patient proves, on the balance of probabilities, that the patient has sustained, as a consequence of having chosen to undergo the medical treatment, physical injury which the patient would not have sustained if warned of all material risks. Because that determination of factual causation necessarily turns on a determination of what the patient would have chosen to do if the medical practitioner had warned of all material risks, the determination of factual causation is governed by s 5D(3). What the patient would have done if warned is to be determined subjectively in the light of all relevant circumstances in accordance with s 5D(3)(a), but evidence by the patient about what he or she would have done is made inadmissible for that purpose by s 5D(3)(b), except to the extent that the evidence is against the interest of the patient.

18 Three factual scenarios have been presented by the cases. One is where the patient would have chosen to undergo the treatment that was in fact chosen even if warned of all material risks[13]. In that scenario, a determination can be made of no factual causation. That is because, absent the negligent failure to warn, the treatment would still have gone ahead when it did and the physical injury would still have been sustained when it was. Leaving aside the possibility of an exceptional case in which s 5D(2) might be invoked, the negligent failure to warn can therefore be determined not to have caused the physical injury. Section 5D(1)(a) is not satisfied in that scenario and there is no occasion to consider the normative question posed by s 5D(1)(b).

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12 *Strong v Woolworths Ltd* (2012) 246 CLR 182 at 190-191 [18]; [2012] HCA 5.

13 See eg *Rosenberg v Percival* (2001) 205 CLR 434.

19 Another scenario is where the patient would have chosen not to undergo the treatment at all if warned of all material risks[14]. In that scenario, a determination of factual causation can be made without difficulty. That is because, absent the negligent failure to warn, the treatment would not have gone ahead at any time and the physical injury would not have been sustained.

20 Yet another scenario is where the patient, if warned of material risks, would have chosen not to undergo the treatment at the time the treatment in fact took place but may have chosen to undergo the treatment at a later time[15]. Analysis of that further scenario has been more controversial. The better analysis is that it is also a scenario in which a determination of factual causation should be made. Absent the negligent failure to warn, the treatment that in fact occurred would not have occurred when it did and the physical injury in fact sustained when the treatment occurred would not then have been sustained. The same treatment may well have occurred at some later time but (provided that the physical injury remained at all times a possible but improbable result of the treatment) the physical injury that was sustained when the treatment in fact occurred would not on the balance of probabilities have been sustained if the same treatment had occurred on some other occasion[16].

21 To determine factual causation in a case within the second or third scenarios, however, is to determine only that s 5D(1)(a) is satisfied. Satisfaction of legal causation requires an affirmative answer to the further, normative question posed by s 5D(1)(b): is it appropriate for the scope of the negligent medical practitioner's liability to extend to the physical injury in fact sustained by the patient?

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14 See eg *Rogers v Whitaker* (1992) 175 CLR 479.

15 See eg *Chappel v Hart* (1998) 195 CLR 232; [1998] HCA 55; *Chester v Afshar* [2005] 1 AC 134.

16 *Chappel v Hart* (1998) 195 CLR 232 at 257 [67]; *Rosenberg v Percival* (2001) 205 CLR 434 at 465 [96]-[97]; *Chester v Afshar* [2005] 1 AC 134 at 142 [11], 161 [81]. See Stevens, "An Opportunity to Reflect", (2005) 121 *Law Quarterly Review* 189 at 190; Jones, "A Risky Business", (2005) 13 *Tort Law Review* 40 at 45-47; Stapleton, "Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar*", (2006) 122 *Law Quarterly Review* 426 at 429-430; Jones, *Medical Negligence*, 4th ed (2008) at [7-075].

22 In a case falling within an established class, the normative question posed by s 5D(1)(b) is properly answered by a court through the application of precedent. Section 5D guides but does not displace common law methodology. The common law method is that a policy choice once made is maintained unless confronted and overruled.

23 In a novel case, however, s 5D(4) makes it incumbent on a court answering the normative question posed by s 5D(1)(b) explicitly to consider and to explain in terms of legal policy whether or not, and if so why, responsibility for the harm should be imposed on the negligent party. What is required in such a case is the identification and articulation of an evaluative judgment by reference to "the purposes and policy of the relevant part of the law"[17]. Language of "directness", "reality", "effectiveness" or "proximity" will rarely be adequate to that task. Resort to "common sense" will ordinarily be of limited utility unless the perceptions or experience informing the sense that is common can be unpacked and explained.

24 A limiting principle of the common law is that the scope of liability in negligence normally does not extend beyond liability for the occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid[18]. Thus, liability for breach of a duty to exercise reasonable care and skill to avoid foreseeable harm does not extend beyond harm that was foreseeable at the time of breach[19]. In a similar way, "a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action" but

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17 *Barnes v Hay* (1988) 12 NSWLR 337 at 353, quoted in *Henville v Walker* (2001) 206 CLR 459 at 491 [98]; [2001] HCA 52.

18 *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 213; *Fleming's The Law of Torts*, 10th ed (2011) at 245; Restatement Third, Torts: Liability for Physical and Emotional Harm §29; Glanville Williams, "The Risk Principle", (1961) 77 *Law Quarterly Review* 179.

19 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 397-400; [1970] HCA 60.

"only for the consequences of the information being wrong"[20]. A useful example, often repeated, is that of a mountaineer who is negligently advised by a doctor that his knee is fit to make a difficult climb and who then makes the climb, which he would not have made if properly advised about his knee, only to be injured in an avalanche. His injury is a "foreseeable consequence of mountaineering but has nothing to do with his knee"[21].

25 Accordingly, as has been pointed out more than once, a medical practitioner is not liable to a patient for physical injury that represents the materialisation of a risk about which it is beyond the duty of the medical practitioner to warn[22]:

> "Thus, a medical practitioner will not be held liable for the failure to warn a patient of a material risk of damage to 'her laryngeal nerve', if the injury that eventuated resulted from a misapplication of anaesthetic. This is so despite the fact that the patient would not have had the treatment and therefore would not have suffered the injury from the misapplication of anaesthetic if the patient had been warned of the risk to 'her laryngeal nerve'." (footnote omitted)

26 Within that limiting principle of the common law, the scope of liability for the consequences of negligence is often coextensive with the content of the duty of the negligent party that has been breached. That is because the policy of the law in imposing the duty on the negligent party will ordinarily be furthered by holding the negligent party liable for all harm that occurs in fact if that harm would not have occurred but for breach of that duty and if the harm was of a kind

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20 *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 214; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 444-445 [76]-[77]; [1999] HCA 25.

21 *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 213. See Stapleton, "Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar*", (2006) 122 *Law Quarterly Review* 426 at 444-448; Stapleton, "The Risk Architecture of the *Restatement (Third) of Torts*", (2009) 44 *Wake Forest Law Review* 1309 at 1325-1326; Stapleton, "Reflections on Common Sense Causation in Australia", in Degeling, Edelman and Goudkamp (eds), *Torts in Commercial Law*, (2011) 331 at 354-355.

22 *Rosenberg v Percival* (2001) 205 CLR 434 at 460 [83], referring to *Chappel v Hart* (1998) 195 CLR 232 at 257 [66].

the risk of which it was the duty of the negligent party to use reasonable care and skill to avoid. However, the scope of liability in negligence is not always so coextensive: "[t]he scope of liability for negligence finds its genesis but not its exhaustive definition in the formulation of the duty of care"[23]. That is in part because the elements of duty and causation of damage in the wrong of negligence serve different functions (the former imposing a forward-looking rule of conduct; the latter imposing a backward-looking attribution of responsibility for breach of the rule) with the result that the policy considerations informing each may be different. It is in part because the policy considerations that inform the imposition of a particular duty, or a particular aspect of a duty, may operate to deny liability for particular harm that is caused by a particular breach of that duty.

27 Accordingly, to accept that a medical practitioner is not liable to a patient for physical injury that represents the materialisation of a risk about which it is beyond the duty of the medical practitioner to warn is not necessarily to accept the converse. It is not necessarily appropriate for the liability of the medical practitioner to extend to every physical injury to a patient that does represent the materialisation of a risk about which it is the duty of the medical practitioner to warn, even where factual causation is established. Further analysis is required.

Analysis

28 On the facts found and assumed, Dr Kam breached his single comprehensive duty to exercise reasonable care and skill in the provision of professional advice and treatment to Mr Wallace by failing to warn Mr Wallace of two material risks of physical injury inherent in the surgical procedure Dr Kam was to perform: the risk of neurapraxia and the risk of paralysis.

29 On the facts assumed, that failure to exercise reasonable care and skill on the part of Dr Kam was a necessary condition of the neurapraxia Mr Wallace sustained. The case in respect of factual causation falls squarely within the second of the factual scenarios already discussed: if warned of all material risks, Mr Wallace would have chosen not to undergo the surgical procedure at all and would therefore not have sustained the neurapraxia. Section 5D(1)(a) is satisfied. Section 5D(2) is irrelevant.

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23 *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 446 [79].

30 The critical question, as the Court of Appeal recognised and on which it divided, is the scope of liability question posed by s 5D(1)(b). Is it appropriate for the scope of Dr Kam's liability to extend to the physical injury in fact sustained by Mr Wallace in circumstances where Mr Wallace would not have chosen to undergo the surgical procedure had he been properly warned of all material risks but where he would have chosen to undergo the surgical procedure had he been warned only of the risk that in fact materialised?

31 The argument in favour of an affirmative answer to that question, to which Beazley JA was persuaded, is that it aligns the scope of Dr Kam's liability with the scope of the duty that Dr Kam (on the facts found and assumed) has breached. The case is unlike that of the mountaineer caught in the avalanche or the patient who suffers injury from the misapplication of anaesthetic. The risk that came home to Mr Wallace was a risk of which Dr Kam had a duty to warn Mr Wallace and of which, in breach of that duty, Dr Kam failed to warn Mr Wallace. The imposition of liability in such a case would reinforce the duty, which Dr Kam would otherwise have breached with impunity to the detriment of Mr Wallace. It would compensate Mr Wallace for the coming home of a risk which was amongst those of which he should have been warned and which he would not in fact have borne had Dr Kam discharged his duty.

32 The argument in favour of a negative answer, to which Allsop P and Basten JA were persuaded, can be expressed somewhat glibly in the proposition that Mr Wallace should not be compensated for the materialisation of a risk he would have been prepared to accept. As is demonstrated by the careful analysis of Allsop P and of Basten JA, however, the ultimately persuasive force of that proposition lies not in its intuitive attraction but in recognition of the distinct nature of the material risks about which Dr Kam failed to warn Mr Wallace and in relating Mr Wallace's acceptance of the risk that came home to the policy underlying Dr Kam's duty to warn Mr Wallace of all material risks.

33 A useful starting point is the discussion of principle by Lord Caplan in *Moyes v Lothian Health Board*[24]. He observed[25]:

> "The ordinary person who has to consider whether or not to have an operation is not interested in the exact pathological genesis of the various complications which can occur but rather in the nature and extent of the

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24 1990 SLT 444.

25 1990 SLT 444 at 447.

> risk. The patient would want to know what chance there was of the operation going wrong and if it did what would happen."

He went on to say[26]:

> "If we were to suppose a situation where an operation would give rise to a 1 per cent risk of serious complication in the ordinary case but where there could be four other special factors each adding a further 1 per cent to the risk, a patient to whom all five factors applied might have a 5 per cent risk rather than the 1 per cent risk of the average person. It is perfectly conceivable that a patient might be prepared to accept the risk of one in 100 but not be prepared to face up to a risk of one in 20. If a doctor contrary to established practice failed to warn the patient of the four special risks but did warn the patient of the standard risk and then the patient suffered complication caused physiologically by the standard risk factor rather [than] by one or other of the four special risks factors I do not think the doctor should escape the consequences of not having warned the patient of the added risks which that patient was exposed to."

He added[27]:

> "The coincidence that the damage which occurred was due to the particular factor in respect of which a warning was given does not alter the fact that the patient was not properly warned of the total risks inherent in the operation and thus could not make an informed decision as to whether or not to go through with it. In the example I give, by going through an operation with five risk factors rather than one the patient was exposed to a degree of risk materially in excess of what the patient had been warned about and was prepared to accept."

34 That reasoning, and its conclusion, are entirely appropriate to a case that involves the coming home of the risk of a single physical injury to which there are several contributing factors the combination of which operate to increase the risk of that physical injury occurring. To fail to warn the patient of one factor while informing the patient of another may in a particular case be to fail to warn the patient of the extent of the risk and thereby to expose the patient to a level of risk of the physical injury occurring that is unacceptable to the patient.

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26 1990 SLT 444 at 447.

27 1990 SLT 444 at 447.

35 The reasoning, however, is not directed or applicable to a case such as the present where what is involved is the materialisation of one of a number of distinct risks of different physical injuries. To fail to warn the patient of one risk while informing the patient of another may still in such a case be to expose the patient to a level of risk of physical injury occurring that is unacceptable to the patient. But the risk of physical injury that comes home in such a case is not necessarily the risk of physical injury that is unacceptable to the patient.

36 Consideration of a case involving the materialisation of one of a number of distinct risks of different physical injuries makes it necessary to return to the nature of the duty and the policy that underlies its imposition. The duty of a medical practitioner to warn the patient of material risks inherent in a proposed treatment is imposed by reference to the underlying common law right of the patient to choose whether or not to undergo a proposed treatment. However, the policy that underlies requiring the exercise of reasonable care and skill in the giving of that warning is neither to protect that right to choose nor to protect the patient from exposure to all unacceptable risks. The underlying policy is rather to protect the patient from the occurrence of physical injury the risk of which is unacceptable to the patient. It is appropriate that the scope of liability for breach of the duty reflect that underlying policy.

37 The appropriate rule of attribution, or "rule of responsibility" to use the language of Allsop P, is therefore one that "seeks to hold the doctor liable for the consequence of material risks that were not warned of [and] that were unacceptable to the patient"[28]. The normative judgment that is appropriate to be made is that the liability of a medical practitioner who has failed to warn the patient of material risks inherent in a proposed treatment "should not extend to harm from risks that the patient was willing to hazard, whether through an express choice or as found had their disclosure been made"[29].

38 Essentially the same rule of attribution, and the same justification for that rule, were articulated in the seminal case on a doctor's duty to disclose material risks in the United States[30]. There it was stated that "the very purpose of the disclosure rule is to protect the patient against consequences which, if known, he

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28 (2012) Aust Torts Reports ¶82-101 at 66,049 [23], referring to *Rosenberg v Percival* (2001) 205 CLR 434 at 461 [86].

29 (2012) Aust Torts Reports ¶82-101 at 66,048 [19].

30 *Canterbury v Spence* 464 F 2d 772 (1972).

would have avoided by foregoing the treatment" and that "[t]he patient obviously has no complaint if he would have submitted to the therapy notwithstanding awareness that the risk was one of its perils"[31]. It appears now to be well-settled in the United States that "the non-disclosed risk must manifest itself into actual injury in order for a plaintiff to establish proximate causation"[32], so that "[a]bsent occurrence of the undisclosed risk, the doctor's omission is legally inconsequential"[33].

39 Dr Kam is not liable to Mr Wallace for impairment of Mr Wallace's right to choose whether or not to undergo the surgical procedure and is not liable to Mr Wallace for exposing him to an unacceptable risk of catastrophic paralysis. He can be liable, if at all, for the neurapraxia Mr Wallace sustained. As both Allsop P and Basten JA pointed out[34], the position of Mr Wallace in respect of the neurapraxia when considered for the purposes of causation is in principle no different from what his position would have been had Dr Kam properly warned him of the risk of neurapraxia and had he made an express choice to proceed with the surgical procedure in light of that warning. He is not to be compensated for the occurrence of physical injury the risk of which he was prepared to accept.

40 The distinct nature of the risks of neurapraxia and paralysis, and the willingness of Mr Wallace to accept the risk of neurapraxia, therefore combine to support the shorthand holding of Harrison J that any failure of Dr Kam to warn Mr Wallace of the risk of paralysis could not be the "legal cause" of the neurapraxia that materialised.

Conclusion

41 The appeal should be dismissed with costs.

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31 464 F 2d 772 at 790 (1972).

32 *Cochran v Wyeth Inc* 3 A 3d 673 at 680 [28] (2010).

33 *Downer v Veilleux* 322 A 2d 82 at 92 (1974).

34 (2012) Aust Torts Reports ¶82-101 at 66,049 [26], 66,071 [174].